In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 635

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-25) is reported at 364 F. 2d 293. The decision and order of the Board (P.A. 12a-17a)[1] are reported at 156 NLRB No. 16.

[1] "P.A." refers to the appendix to petitioners' brief in the court below, a copy of which was filed with the petition.

JURISDICTION

The decision of the court of appeals was issued on July 25, 1966. On August 26, 1966, petitioners' petition for rehearing was denied and a decree was entered (Pet. App. 26-27). The petition for a writ of certiorari was filed on October 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An employer may withdraw from a multiemployer bargaining unit by giving timely and unequivocal notice. The question presented is whether the Board properly held that a union may withdraw in the same manner.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 29-31 of the appendix to the petition.

STATEMENT

Petitioners are four New York City newspaper publishers and the association which represents them in their bargaining negotiations. For many years, they have engaged in collective bargaining on a multiemployer basis with New York Typographical Union No. 6, which represents composing room employees. During this period, any publisher desiring to bargain on an individual basis has been free to resign from

the Association, and some have done so (P.A. 123a, 171a-172a, 200a, 215a-219a, G.C. Ex. 6.).

On June 26, 1964, the Union advised the Association and each publisher-member that it desired to terminate the existing agreement on its expiration date, March 30, 1965, and to negotiate with each of the publishers separately (P.A. 13a; 286a-289a). On July 21, 1964, the Association, acting on behalf of the publishers, "unqualifiedly reject[ed]" the Union's request for bargaining on an individual employer basis, because, in its view, the Union did not have "the unilateral right to disregard and overturn joint collective bargaining relationships that have existed for many years" (P.A. 13a; 290a-291a).[2] The Union then filed charges with the Board, alleging that the publishers had refused to bargain in violation of the Act (P.A. 13a, 24a; 66a, 290a-291a).

In *Evening News Association*, 154 NLRB No. 121 (P.A. 36a-57a),[3] the Board (with Member Brown dissenting) held that union withdrawals should be governed by the same principle applicable to employer withdrawals from a multiemployer bargaining unit—*i.e.*, the employer can withdraw at will provided that the withdrawal request is timely and unequivocal. Following that decision here, the Board found that

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[2] It is not disputed that the Union represented a majority of the composing room employees at each publisher's plant (P.A. 24a; 62a).

[3] The Board's decision in *Evening News Association* is presently before the Court of Appeals for the Sixth Circuit, on petitions for review and enforcement.

the Union gave timely and unequivocal notice of its desire to withdraw from the multiemployer unit and to bargain with each publisher individually, and that single-employer units of composing room employees were appropriate under the Act. Accordingly, the Board (with Member Brown dissenting) concluded that each publisher violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of its composing room employees (P.A. 14a-15a). The Board ordered each publisher to cease and desist from such refusal and to bargain with the Union upon request (P.A. 32a-33a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 17-25).

ARGUMENT

The decision of the court of appeals, sustaining the Board's holding that a union may withdraw from a multiemployer bargaining unit on the same terms as an employer, is correct, and there is no conflict of decisions. There is no occasion for further review.

Although the Act does not expressly provide for bargaining units larger than "the employer unit,"[4] the Board, from its earliest days, has concluded that it is empowered to find, and has found, multiemployer units appropriate for bargaining purposes where the parties have mutually consented to bargain, and there

[4] Section 9(b) provides that the Board shall determine in each case whether the appropriate unit for collective bargaining shall be "the employer unit, craft unit, plant unit, or subdivision thereof."

has been a history of bargaining, on a multiemployer basis.[5] As this Court noted in *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95, proposals made in 1947 "to limit or outlaw multi-employer bargaining * * * failed of enactment." From this, the Court concluded that "Congress intended 'that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future' " (*id.* at 96, quoting from the dissenting opinion in the lower court, 231 F. 2d 110, 121 (C.A. 2)). The Board exercised its "specialized judgment" with respect to the problem presented here in a reasonable manner, and the court below properly declined to disturb that judgment.

Since mutual consent is an essential predicate for the establishment of a multiemployer bargaining unit, the Board has consistently allowed employers to withdraw from an existing multiemployer unit, where the notification of withdrawal has been communicated at a proper time and in an unequivocal manner.[6] The

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[5] See, *e.g.*, *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002, 1024-1025; *Rayonier Incorporated*, 52 NLRB 1269, 1274-1275; *Andes Fruit Co.*, 124 NLRB 781, 783.

[6] Notification of withdrawal is timely if "given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." *Retail Associates, Inc.*, 120 NLRB 388, 395. See also *Anderson Lithograph Co., Inc.*, 124 NLRB 920, 928-929, enforced *sub nom. National Labor Relations Board* v. *Jeffries Banknote Co.*, 281

consensual basis for a multiemployer unit is impaired when a union withdraws its consent no less than when an employer does. Accordingly, in the Board's view, there is no rational basis for denying "the bargaining representative the same opportunity it allows employers of withdrawing from the multiemployer unit" (P.A. 41a). As the Union's notice of intent to abandon multiemployer bargaining was unequivocal and was communicated well before the start of new negotiations, the Board properly sanctioned the Union's withdrawal from the existing unit.

A different conclusion is not required by the consideration that to permit the Union to withdraw from the multiemployer unit here would allow it to terminate a long history of successful bargaining on a multiemployer basis. As the Board pointed out, the same consequences would follow had a publisher elected to withdraw from the unit. "In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer unit, and in either case, the union may be faced with the possi-

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F. 2d 893 (C.A. 9); *Detroit Window Cleaners Union, Local 139*, 126 NLRB 63, 70-71; *Tulsa Sheet Metal Works*, 149 NLRB 1487, enforced *sub nom. National Labor Relations Board* v. *Tulsa Sheet Metal Works* (C.A. 10), October 5, 1966.

The statements in *Retail Associates, Inc., supra*, and *Dittler Bros.*, 132 NLRB 444, 446—to the effect that the Board will not permit the parties to control unit determinations under the Act (Pet. 12)—are not inconsistent with the foregoing. The Board was referring to situations where the withdrawal from the multiemployer unit either was not in good faith (*Retail Associates*) or was untimely (*Dittler Bros.*).

bility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit * * *" (P.A. 44a).

Nor may a distinction between employer withdrawal and Union withdrawal properly be founded on the view that "[w]hen an employer withdraws from multiemployer bargaining, the structure is left untouched; [but] when a union withdraws 'the very identity, nature and composition' of the employer group are overturned" (Pet. 11). An employer's withdrawal, no less than a Union's, may cause the dissolution of the employer group—for example, when the dominant member withdraws from a multiemployer association or when any member withdraws from a two-employer group. Moreover, the Union's withdrawal does not necessarily require dissolution of the employer group. As the court of appeals correctly pointed out, the publishers may still bargain through the Association "as designee of each employer in individual bargaining" (Pet. App. 22).[7]

Finally, as the Board noted, "[u]nions, like employers, would understandably be reluctant to initiate

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[7] Petitioners suggest (Pet. 13) that union withdrawal from a multiemployer unit should be curbed because of the danger of whipsaw strikes. But the Board expressly reserved decision as to "whether a union's withdrawal from multiemployer bargaining followed by its striking fewer than all of the former employer members of the larger unit would effectively deny to the employers who are not struck the right to engage in a lockout" (P.A. 42a). See *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 490; *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300.

multiemployer bargaining if the decision to do so were virtually irrevocable. Restricting union withdrawal might therefore in fact discourage multiemployer bargaining and not encourage it" (P.A. 45a).

In view of these considerations, it is clear that the Board's well-considered "specialized judgment" on the question of union withdrawal is a sound one.[8]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1966.

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[8] There is no merit in petitioners' contention (Pet. 14) that, in the circumstances of this case, they should not have been required to test the propriety of the new units sought by the Union in an unfair labor practice proceeding. As the court of appeals correctly observed (Pet. 24), this situation is no different from that in which any new bargaining unit is involved. See, *e.g.*, *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463 (C.A. 2).

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